THE CRITICISM OF CASES.

PROFESSOR JOHN C. GRAY, in his book on "Perpetuities," says, "The prevention of property from inalienability is simply an incident of the rule against perpetuities, not its object. The true object of the rule is to restrain the creation of future conditional interests."[1]

This is a bold statement. The following quotations will show the object of the rule as it lay in the minds of the judges who made it, and of those who have since applied it.

Lord Chancellor Nottingham, in 1681: "A perpetuity is the settlement of an estate or an interest in tail with such remainders expectant upon it as are in no sort in the power of the tenant in tail in possession, to dock by any recovery or assignment. But such remainders must continue as perpetual clogs upon the estate."[2]

Lord Keeper Guildford, in 1683: "If in equity you should come nearer to a perpetuity than the rules of common law would admit, all men, being desirous to continue their estates in their families, would settle their estates by way of trust, which might indeed make well for the jurisdiction of the court, but would be destructive to the commonwealth."[3]

Powell, J., in 1698: "But they were not for going one step further because these limitations make estates unalienable, every executory devise being a perpetuity as far as it goes; that is to say, an estate unalienable though all mankind join in the conveyance."[4]

Lord Talbot, in 1736: "However unwilling we may be to extend executory devises beyond the rules generally laid down by our predecessors, yet . . . considering that the power of alienation will not be restrained longer than the law would restrain it (viz., during the infancy of the first taker), which cannot reasonably be said to extend to a perpetuity," etc.[5]

Lord Eldon, in 1805: "The question always is whether there is a rule of law fixing the period during which property may be unalienable."[6]

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[1] Gray on Perpetuities, § 600.
[2] Norfolk's Case, 3 Ch. Cas. 1, 31.
[3] Norfolk *v.* Howard, 1 Ver. 163.
[4] Scatterwood *v.* Edge, 1 Salkeld, 229.
[5] Stephens *v.* Stephens, Temp. Talb. 228, 232.
[6] Thelusson *v.* Woodford, 11 Ves. 146.

Lord Chancellor Cottenham, in 1849: "These rules are to prevent, in the cases to which they apply, property from being inalienable beyond certain periods." [1]

Kay, J., in 1889: "The truth is that under the old feudal law existing in England, which is only being broken down slowly by legislation and decisions of the court, and which still exists to a very great extent, there has been a constant attempt on the part of owners of land to limit it in the most elaborate fashion, in order to tie it up as long as possible, and that constant attempt has been constantly defeated both by legislation and the decisions of courts of law." [2]

Shaw, C. J., in 1853: "A man cannot, under this general *jus disponendi*, thus tie up property in perpetuity and make it inalienable in his own posterity. It is a legal impossibility." [3]

Gray, J., in 1865: "The reason of the rule is, that to allow a contingent estate to vest at a more remote period would tend to create a perpetuity by making the estate inalienable." [4]

These quotations might be multiplied. It is enough, however, to say that there seems never to have been any doubt in the minds of judges that the rule against perpetuities is properly so named, and that the restraint upon the creation of future conditional interests is not the object of the rule, but simply the means by which that object is effected.

It is true that in his chapter entitled "Interests though alienable may be too remote," Professor Gray shows that the rule applies to some cases where, by the co-operation of those holding the present interest and the remote interest, the property may be alienated. In other words, the reason for the rule is not quite co-extensive with its application. But are there not many such misfits in the law? This fact alone seems hardly a sufficient ground for discarding the accepted reason, and framing a new one, as in section 269: "It is not the inalienability of an interest dependent upon a remote contingency, but its utterly uncertain value, which furnishes the sufficient justification, if it was not the original ground of the rule against perpetuities."

Professor Gray proceeds to attack at some length Christ's Hospital

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[1] Christ's Hospital *v.* Grainger, 1 McN. & G. 460.
[2] Whitby *v.* Mitchell, L. R. 42 Ch. D. 494, 500 (1889).
[3] Blake *v.* Dexter, 12 Cush. 559, 570.
[4] Odell *v.* Odell, 10 Allen, 1, 5.

v. Grainger [1] and Jones *v.* Habersham; [2] and the force of his criticism rests upon the assumption that the true object of the rule against perpetuities is not what the judges have always supposed it to be. Those cases hold that a limitation over to one charity after a gift to another charity is not a violation of the rule against perpetuities, because that rule does not apply to charities.

If the true object of the rule is to prevent the tying up of property, it follows that the right to tie up property in favor of one charity is simply an exception to the rule; and the courts, in holding that property may as well be tied up in favor of two successive charities as of one, stand upon firm ground. If, however, the true object of the rule is to prevent the creation of remote interests, then Professor Gray may be right in supposing that the courts have blundered into a violation of the rule.

Mr. Justice Holmes in two lectures upon Agency, delivered while he was professor in the Harvard Law School, and reprinted last year in this REVIEW,[3] has pointed out what seem to him anomalies in the law of agency; and the principal of these is the law making the master responsible for the torts of his servant done in the course of his business, though against his commands.

In his view this doctrine is not to be explained upon any rational principle. He has therefore sought an historical explanation for it in the *patria potestas* of the Roman law. The absolute power of the head of the family over his children and his slaves, and his responsibility for their conduct to the outside world, gave rise to the notion of identity between the head and its various members. The phrase expressing this identity, being retained as a working formula after the relation which gave rise to it had ceased to exist, has led to that enlarged responsibility of the master for his servants to which the courts of common law now stand committed.

The lecturer admits, with characteristic candor, that the Roman law "developed no such universal doctrines of agency as have been worked out in England," and that "it was not generally possible to acquire rights or to incur obligations through the acts of free persons" (p. 350); and that even in Bracton, who wrote "under the full influence of the Roman law," he can find no "passage which distinctly asserts the civil liability of masters for their servants'

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[1] 1 McN. & G. 460.

[2] 107 U. S. 174.

[3] Harvard Law Review, iv. 335; v. 1.

torts apart from command or ratification" (p. 355). It is to be noticed further that the absolute liability of the master for the torts of his slave, which sprang from the ancient obligation to surrender the noxious thing, was the same whether the slave was on his master's business, or on his own private business of murder and rapine. The doctrines of the Roman law, therefore, would have to be both cut down and pieced out before they could be made to resemble the common-law "anomaly" in question. The lecturer admits also that it is not necessary to go back to the Twelve Tables to account for the notion of identity so far as it is involved in the maxim *Qui facit per alium, facit per se*, but that any modern judge might have invented such a rule. It is only the responsibility of the principal for acts which he does not authorize which calls for some occult explanation; and this part of the law is confessedly of modern growth.

The obvious objection to the theory advanced is that it appears not to be supported by the judges who made the law.

The naturalist cannot ask the frog how he came to be a frog. He is therefore compelled to rest his theories of evolution upon a minute examination of fossils. But when we inquire how a particular judge came to decide a particular case in a particular way, it is always prudent to see first of all what explanation the judge himself has to offer. And when his opinion is tolerably full and tolerably clear, it is not altogether safe to assume that any process of unconscious celebration has had much to do with the result.

An examination of the cases seems to justify the conclusion that the English judges have not used the "formula" or "fiction" that principal and agent are one heedlessly, or without due regard to its proper limits. On the contrary, their judgments seem to have been founded upon considerations of practical convenience and hard-headed common-sense.

There is space to refer only to the decisions of Lord Holt, which, as Judge Holmes says, "furnish the usual starting-point of modern decisions."

In *Turberville* v. *Stampe*,[1] Lord Holt says: "So in this case, if the defendant's servant kindled the fire in the way of husbandry, and proper for his employment, though he had no express command of his master, yet the master shall be liable to an action for damage

[1] Ld. Raymond, 264.

done to another by the fire, for it shall be intended that the servant had authority from his master, it being for his master's benefit."

In *Hern* v. *Nichols*,[1] "Holt, C. J., was of the opinion that the merchant was answerable for the deceit of his factor, though not *criminaliter*, yet *civiliter*; for seeing somebody must be a loser by this deceit, it is more reasonable that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger."

In *Lane* v. *Cotton*,[2] an action against the postmaster-general for the loss of certain exchequer bills which had been delivered at the post-office, Lord Holt said: "What is done by the deputy is done by the principal, and it is the act of the principal, who may displace him at pleasure, even although he were constituted for life." And again, "It is a hard thing to charge a carrier; but if he should not be charged, he might keep a correspondence with thieves, and cheat the owner of his goods, and he should never be able to prove it."

I find no evidence in these opinions that Lord Holt was carried away by the use of formulas whose application he did not understand. Nor can I assent to the view that this enlarged responsibility of the principal is so irrational as to be accounted for only by some illogical working of the judicial mind. The most careful person will sometimes be careless, and for those careless acts the law holds him responsible. The most carefully selected servant engaged in his master's business will sometimes be careless. Upon what ground should the person for whose benefit the business is carried on be held to a greater degree of liability in the one case than in the other? It can readily be seen that if any other rule had been established, there would be an enormous inducement to every man carrying on a business in which accidents were likely to happen, and damage was likely to be done, to get himself incorporated, and have his work done by agents for whose torts he need not answer.

I have taken here two instances of legal criticism, by writers of the highest authority, for the purpose of giving point to the question whether any limit may properly be set to the criticism of cases.

Professor Gray suggests a new reason for an old rule, and upon the strength of that suggestion attacks a decision which is plainly sound, if the reason which has been given by the judges for two hundred years is sound.

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[1] 1 Salk. 289. [2] 1 Salk. 17, 18.

Judge Holmes suggests a remote historical explanation for a well-established rule which he declares to be an absurdity and an anomaly. But the judges by whom that rule has been enunciated and applied, the most eminent of their time, have been quite unconscious of the historical influence, and have never recognized the absurdity.

Neither of these writers would wish to be called a law reformer, meaning by law reformer a person who is ambitious to write a code. They aim, not at the improvement of the law by legislation, but rather at such improvement in its study and in its administration as shall render its principles more intelligible, and its application more certain.

How far do these speculations tend to clear up the knotty points of the law? Are we to take nothing for granted? Are we to argue every question *de novo*, as if the decisions of the last two hundred years had settled nothing? Are we to reconstruct our precedents by declaring that the grounds upon which the decisions are made to rest are not the true grounds?

The criticism of a case because it is opposed to another case, or to a principle which has been established and defined by a line of cases, — all this we understand. But to criticise a case because it is opposed to a principle which the writer would be glad to see recognized, as more rational or as offering a fairer ground for the decided cases to rest upon than any which the courts have seen fit to adopt, — what is this but a beating of the air? How does such criticism help us to a sound judgment of cases and a correct application of principles?

Jabez Fox.